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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5176

JEROME FRANKS,

Petitioner,

v.

THE STATE OF DELAWARE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF FOR RESPONDENT

HARRISON F. TURNER
Deputy Attorney General
Department of Justice
Sykes Building
45 The Green
Dover, Delaware 19901

RICHARD R. WIER, JR.
Attorney General
Department of Justice
American-International Bldg.
Wilmington, Delaware 19801

Attorneys for Respondent

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BRIEF FOR RESPONDENT

RESTATEMENT OF QUESTION PRESENTED

Did the Trial Court in refusing to hear testimony at a suppression hearing which purportedly would challenge the truth of certain averments of a search warrant affidavit, act contrary to the Fourth Amendment of the United States Constitution.

SUMMARY OF ARGUMENT

The question posed is improperly before this Court because of initial fatal defect of first introduction contrary to Delaware procedural rules.

The exclusionary rule should not be applied to this state case since the rule is not integral to the 4th Amendment but merely adjunctive thereto. Stone v. Powell, 428 U.S. 465 (1975). Extension of the rule to state cases infringes on the orderly administration of criminal justice, a predominant state function, with no proven deterrent effect. Federal cases applying the exclusionary rules can be distinguished on the basis of federal rules of criminal procedure different from Delaware. Societal interests far outweighing individual protections are jeopardized by such extension.

Even if rule is extended to this case the proffer of proff was insufficient to trigger a hearing on the suppression request. United States v. Carmichael, 489 F.2d 983 (C.A. 7 1973). No specific allegation of intentional, reckless or negligent misrepresentation on the part of the affiants was advanced to warrant a time consuming, trial prolonging, hearing process.

The evidence recovered in the search warrant and introduced at trial was insignificant to the jury verdict of guilt. It only served to assist establishment of identification which was superfluous in view of positive identification of victim, pretrial admissions of defendant and the latters own testimony. Further, the averments challenged were of marginal value in establishment of probable cause and not essential thereto.

ARGUMENT

I.

THE QUESTION POSED IS NOT PROPERLY BEFORE THIS COURT FOR REVIEW BECAUSE IT WAS INITIALLY STATUTORILY DEFICIENT IN PRESENTATION TO THE TRIAL COURT.

Rule 41 (e) Delaware Superior Court Criminal Rules provide that unless opportunity did not exist or the moving party was not aware of the grounds, a motion to suppress evidence shall state the grounds upon which it is made.[1] The Motion purportedly giving rise to this review is completely devoid of even a remote reference to the veracity of the allegations contained in the search warrant affidavit (App. PPS. 11, 12).

The Procedural Criminal Rules of the Delaware

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1 "(e) Motion for Return of Property and to Suppress Evidence. An application for the return of property and to suppress for use as evidence anything obtained as a result of an unlawful search and seizure shall be made by motion supported by the affidavit of the person on whose behalf the motion is made. The motion shall state the grounds upon which it is made and shall set forth the standing of the moving party to make the application. The motion shall be made before the trial or hearing in which the property seized may be used as evidence, unless opportunity therefor did not exist or the moving party was not aware of the grounds for the motion; but the Court in its discretion may entertain the motion at the trial or hearing. Issues of fact shall be determined by the Court on affidavits or in such other manner as the Court directs."

Superior Court have the force and effect of statute.[2] They are entitled to appropriate weight in the considerations of this Court. Wainwright v. Sykes, 53 L.Ed.2d 594 (1977). Comity and orderly administration of justice require this Court to give proper deference to the mandate of the state court.

Concededly, Delaware raises this issue for the first time in this proceeding. It does so under the doctrine of plain error and requests the Court to take cognizance thereof in that concept. The writ should be dismissed as improvidently granted.

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[2] 11 Del.C. §5121 (a) - "The Superior Court may, from time to time, adopt and promulgate general rules which prescribe and regulate the form and manner of process, pleading, practice and procedure governing criminal proceedings in the Superior Court from their inception to their termination, including such proceedings before inferior courts and justices of the peace as are preliminary to indictment or information filed in the Superior Court."

11 Del. C. §5122 - "Any inconsistency or conflict between any rule of court promulgated under the authority of §5121 of this title, or prior law, and any of the provisions of this Code or other statute of this State, dealing with practice and procedure in criminal actions in the Superior Court, shall be resolved in favor of such rule of court."

II.

THE FOURTH AMENDMENT EXCLUSIONARY RULE SHOULD NOT BE EXPANDED TO REQUIRE INDIVIDUAL STATES TO ALLOW SUPPRESSION HEARINGS TO DETERMINE THE VERACITY OF THE ALLEGATIONS IN AN AFFIDAVIT SUPPORTING A SEARCH WARRANT CONSTITUTIONALLY VALID ON ITS FACE.

The so-called "exclusionary rule" promulgated in Weeks v. United States, 232 U.S. 383 (1914), and made applicable to the states in Mapp v. Ohio, 367 U.S. 643 (1961), is the nexus to the question under consideration. Neither defendant's guilt nor innocence is at stake at this juncture. The sole issue is the admissibility of otherwise competent and relevant evidence. Aquilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969), have laid down 4th Amendment guidelines for search warrant affidavits. Compliance therewith adequately fulfills 4th Amendment requirements without further extension of an exclusionary rule to deflect the truth finding function of trial by deletion of reliable evidence. As stated in the unanimous New Jersey Supreme Court opinion in State v. Petrillo, 293 A.2d 649, 653 (1972) cert. den. 410 U.S. 945:

> "In our view the constitutional safeguards are met when the impartial judge finds the affidavit for the warrant credible and legally sufficient. Compliance with the requirement for an oath by the officer must be regarded as a procedurally adequate manifestation of his veracity. That oath followed by the judge's determination that the facts vouched for show

probable cause are all the Constitutions demand and guarantee to our citizens."

The exclusionary rule has been described in United States v. Calandra, 414 U.S. 328, 348 (1974), in language as follows:

> "In sum, the rule is a judically created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."

The foregoing language was more recently adopted in United States v. Janis, 428 U.S. 433, 436 (1976). This Court in Calandra, supra, refused to extend the exclusionary rule to Grand Jury proceedings and in Janis, supra, likewise refused extention to civil matters. Stone v. Powell, 428 U.S. 465, 486 (1975), stating that "Post-Mapp decisions have established that the rule is not a personal constitutional right" refused to allow an application for habeas corpus predicated upon a violation of the exclusionary rule. Walder v. United States, 347 U.S. 62 (1954), allowed evidence tainted by the exclusionary rule to be introduced for impeachment purposes. Such ruling lend credence to the proposition that the exclusionary rule is not an integral part of the 4th Amendment but only an adjunctive remedy. This remedy empirically has not been shown to be effective. Powell, supra. Weighing the utility of the exclusionary rule against the costs to rational enforcement of the criminal law requires enumeration of the balancing factors. Application of the rule in this and similar cases would possibly serve to weed out what must be a minimal number of perjurious government agents. Of course the sanction as a remedy would be superimposed on an

already existing severe penalty for perjury.[3] No deterrent effect can be rationalized which would add to the existing deterrence of a perjury charge and conviction. On the other hand criminal trial dockets are increasing daily with the necessity for expenditing trials internally as well as numerically. Of course a 6th Amendment speedy trial right exists in every defendant awaiting disposition. To prolong trials by imposition of exclusionary rule suppression hearings would disastrously tax already overburdened trial calendars jeopardizing 6th Amendment rights to those awaiting trial.

A substantial consideration in Mapp, supra, influencing the imposition of the exclusionary rule upon the states appears to be a lack of an alternative effective remedy suiting the facts involved therein. In this case an entirely adequate remedy, dehors the exclusionary rule, is readily apparent in the form of perjury, contempt of court, or official misconduct prosecutions and/or civil rights actions against the State. In Delaware where the Attorney General prosecutes all crimes without supervisory or disciplinary authority over any of the various police agencies no conflict of interest is possible in prosecutions of offending police officers.

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[3] 11 Del. C. §1221 - "A person is guilty of perjury in the third degree when he swears falsely." (A misdemeanor subject to 2 years imprisonment).

11 Del. C. §1222 - "A person is guilty of perjury in the second degree when he swears falsely and when his false statement is:

(1) Made in a written instrument for which an oath is required by law; and

(2) Made with intent to mislead a public servant in the performance of his official functions; and

(3) Material to the action proceeding, or matter involved."

(E felony subject to 7 years imprisonment)

The benefit of the exclusionary rule's deterrent effect in this case is far outweighed by the societal interests in preserving the integrity of orderly criminal law enforcement.

This Court has previously recognized that the prevention and dealing with crime is much more the business of the states than it is of the Federal Government. Irvine v. California, 374 U.S. 128 (1953), which was followed in Patterson v. New York, 53 L.Ed.2d 281 (1977). Patterson further elaborated that the administration of justice by the individual states in the burden of producing evidence should not be intruded upon by this Court's lightly construing the Constitution. The imposition of the exclusionary rule in the area under review would seriously impede the states orderly administration of justice. The Court should undergo further restraint when considering application of a deterrent remedy not integral to the Constitution.

A substantial number, if not the majority, of states considering the question propounded here in the absence of statute have rejected the pre-trial suppression procedure challenging the truth of the allegations in a search warrant affidavit. State v. Sabario, 514 P.2d 474 (Ariz. 1973); Liberto v. State, 451 S.W.2d 464 (Ark. 1970); People v. Thornton, 327 P.2d 161 (Cal. 1958); People v. Healy, 261 N.E.2d 468, cert. den. 402 U.S. 905 (Ill. 1971); Mattingly v. Commonwealth, 221 S.W2d 82 (Ky. 1949); Caslin v. Commonwealth, 491 S.W.2d 832 (Ky. 1973); State v. Anselmo, 256 So.2d 98 (La. 1971); Tucker v. State, 224 A.2d 111, cert. den. 386 U.S. 1024 (Md. 1966); Wood v. State, 322 So.2d 462 (Miss. 1975); State v. Petillo, 293 A.2d 649 (N.J. 1972), cert. den. 410 U.S. 945; State v. Edwards,

311 P.2d 266 (Okla. 1957); Owens v. State, 399 S.W.2d 507 (Tenn. 1965); Griffey v. State, 327 S.W.2d 585 (Tex. 1959); Annot. 5 ALR.2d 394; Kipperman: Search Warrant Affidavits 84 Harv. L. Rev. 825, 828. This Court should recognize that individual states are confronted with widely varying problems in the local administration of criminal justice which are best resolved by the highest court within each state. Any attack on the decisions of these courts should be considered in this vein as well as with a view of comity, judicial integrity and societal values.

The decision in the Federal Circuit Courts which approve inquiry into the veracity of a search warrant supporting affidavit are distinguishable from Delaware practice. Prior to October 1, 1972, Rule 41 (e) Federal Criminal Rules provided inter alia "(4) there was not probable cause for believing the existence of the grounds on which the warrant was issued".[4]

[4] "(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trail. The motion to suppress evidence may also be made in the district where the trail is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

Subsequent to October 1, 1972, Rule 41 (e) of the Federal Criminal Rules provides for the return of property to an aggrieved person "on the ground that he is entitled to lawful possession of the property which was illegally seized. The Judge Shall receive evidence on any issue of fact necessary to the decision of the motion."[5] Delaware's Rule 41 has no similar provision.[6] In the latter case reliance is obviously placed in the neutral judicial officer to determine credibility of the affiant as an integral requisite for issuance of the warrant. McCray v. Illinois, 386 U.S. 300, 307 (1967) bolsters this concept in the following language:

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5 "(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trail. If a motion for return of property is made or comes on for hearing in the district of trail after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12."

6 "(e) Motion for Return of Property and to Suppress Evidence. An application for the return of property and to suppress for use as evidence anything obtained as a result of an unlawful search and seizure shall be made by motion supported by the affidavit of the person on whose behalf the motion is made. The motion shall state the grounds upon which it is made and shall set forth the standing of the moving party to make the application. The motion shall be made before the trial or hearing in which the property seized may be used as evidence, unless opportunity therefore did not exist or the moving party was not aware of the grounds for the motion; but the Court in its discretion may entertain the motion at the trial or hearing. Issues of fact shall be determined by the Court on affidavits or in such other manner as the Court directs."

> "The Fourth Amendment is served if a judicial mind passes upon the existence of probable cause. Where the issue is submitted upon an application for a warrant, the magistrate is trusted to evaluate the credibility of the affiant in an ex parte proceeding."

Finally the search warrant affidavit is unattainably beyond the reach of insulation from all mis-information. Hearsay, Jones v. U.S., 362 U.S. 257(1960), an unnamed reliable informant, McCray v. Illinois, 386 U.S. 300 (1967),fleeting observations, co-defendants activities, etc., are all incapable of testing for veracity. Since only probable cause is the criteria and neither guilt nor innocence depends on the outcome, these areas are free from truth seeking inquiry without infringement on the 4th Amendment. In this light an affidavit embracing an oath is necessarily on a higher plane of credibility and should be conclusive.

III.

ASSUMING, ARGUENDO, A RIGHT TO A HEARING TO DETERMINE THE VERACITY OF ALLEGATIONS IN A SEARCH WARRANT AFFIDAVIT, THE PRELIMINARY SHOWING WAS INSUFFICIENT TO INITIATE SUCH PROCESS.

The majority, if not all, courts both Federal and State passing upon the threshold question of the right to a hearing on the truthfulness of a search warrant affidavit hold that a substantial showing of misstatement must be demonstrated to trigger the hearing. As stated in United States v. Bolton, 458 F.2d 377, 378 N.6. (9th CA 1972):

> "Nevertheless, existing authority uniformly requires a strong and substantial showing prior to the holding of a hearing upon such question. There is no justification for allowing such a de novo trial of the issuing magistrate's determination as a routine step in every case. United States v. Halsey, 257 F.Supp. 1002 (S.D.N.Y. 1966); United States v. Roth, 28 F. Supp. 364 (S.D.N.Y. 1968); United States v. Gillette, 383 F.2d 843 (2nd Cir. 1967); United States v. Dunning, 425 F.2d 836 (2nd Cr. 1969)."

See also United States v. Rael, 467 F.2d 333 (CA 10 1972); United States v. Carmichael, 489 F.2d 983 (CA7 1973); United States v. Thomas, 489 F.2d 664, 669 (CA 5 1973); United States v. Marchart, 492 F.2d 899 (CA 8 1974); United States v. Thornton, 454 F.2d 957, 966-970 (D.C. Cir. 1971); People v. Alfinito, 16 N.Y.2d, 211 NE.2d 644 (1965); State v. Boyd, 224 NW.2d 609 (Iowa, 1974); State v. Petillo, 293 A.2d 649 (N.J. 1972); O'Bean v. State, 184 So.2d 635 (Miss. 1966); State v. Goodlaw, 523 P.2d 1204 (Wash. 1974).

Defendant's attorney first requested the hearing on the morning of trial stating that he questioned the validity of some of the points made in the affidavit. (App. P. 14). As a proffer of proof he stated "I intend to produce Mr. Wesley Lucas, * * * * , and Mr. James Morrison, * * * *, who I believe will give information that will tend to impeach the information contained in the affidavit, not only as to its accuracy but to the fact it was never given and as such there may have been a rather material misrepresentation made by either one or both of the affiants contained in the search warrant." (App. P. 16) (underlining added)

Probable cause is the legal yardstick underlying the initiation of any and all criminal judicial actions.

Searches with or without a warrant, arrests with or without a warrant, informations and indictments, Grand Jury actions, preliminary hearings, extraditions, etc., all embrace that element. It should equally be applicable to a petition to collaterally attack a facially sufficient search warrant affidavit. The proffer here made, supra, falls fatally short of any concept of probable cause or "a strong and substantial showing" (Bolton, supra) that misstatements were contained in the affidavit. To allow a hearing in this case would grant a license to all defendants in search and seizure matters to routinely embark on a general discovery, time consuming process. The impediment to orderly criminal law enforcement is obvious and not to be condoned.

The burden to initiate the hearing with probable cause to warrant a trial court's belief that misstatements exist in the affidavit manifestly belongs on the defendant. The search warrant is facially sufficient and the following presumptions exist:

> (1) The affiants, police officers, properly performed their duties. Wharton's Criminal Evidence, 13th Ed. P. 209; State v. Emory, 193 Kan. 52, 391 P.2d 1013, cert. den. 379 U.S. 906 (1964).
>
> (2) Innocence from the crime of perjury or false statement as to the affiants.
>
> (3) The magistrate, a judicial officer, properly performed his duty.

It is encumbent upon the defendant to offer rebuttal to these presumptions in order to take a demand for a hearing out of the condemned routine procedure. This the defendant failed to accomplish and the trial court was eminently correct in denial of a hearing.

An additional flaw in the so called offer of proof

with relation to the alleged inaccuracy of the information in paragraph 17 of the affidavit (App. P. 8) was demonstrated at trial in the following cross-examination of defense witness Lucas:

> "O. Mr. Lucas, isn't it true that Mr. Franks frequently wore a thermal undershirt and a brown jacket and a dark green knit hat?
>
> A. Yes, I have seen him wear that." (App.P. 36)

The record is devoid of testimony of any other witness on the veracity of the affidavit allegations. Thus, the only demonstrable point of defense counsel's speculative offer of proof clearly demonstrates fundamental error which, it is submitted, is presumptive of the balance of the offer.

IV.

ASSUMING ARGUENDO THAT THE AFFIDAVIT IN SUPPORT OF A SEARCH WARRANT MAY BE TESTED FOR THE VERACITY OF THE ALLEGATIONS CONTAINED THEREIN AT A PRE-TRIAL SUPPRESSION HEARING THE ERROR IN THE CASE AT BAR WOULD HAVE BEEN HARMLESS.

The record discloses that the evidence sought to be suppressed amounted to the following items: a thermal undershirt, black pants with a belt, brown 3/4 length coat, a thermal knit cap and a knife (App. PPS 30, 31, 32). The opening statement of defense counsel left no

doubt but what the defense was to be voluntary consent to the charges of Rape, Kidnapping and Burglary 1st Degree (Excerpt defendant's opening statement P.2). The defendant in his pre-trial admissions admitted his identification as the person involved in the alleged charges. (Record PPS 217, 218, 220, 221) The victim positively identified the defendant at trial (App. P. 28). Further, the defendant admitted his identification in his direct testimony (App. P. 37). Thus, the introduction of items of defendants clothing answering the victims description was rendered completely harmless as a mere substantiation of an established fact.

One item other than identification items of clothing sought to be suppressed consisted of a knife (App. 32). The knife merely served the purpose of transposing the victims verbal description into a generic example of what she was attempting to convey. Her identification of the knife was couched in the following words:

> "I did not see the knife in the light, but I did feel of it and it had, as I told the Police, it had one smooth edge and one sharp edge and it appears to be the same length as what I described." (Record P. 69)

On cross-examination relative to the knife, the victim stated that she saw the knife only in pitch darkness to the extent of its outline and a dark rather than light handle. (Record P. 105) Subsequently she stated she could not be positive of the knife's identification except that it had a flat edge and a sharp edge and it conformed to the description she had given the police. (Record PPS. 114, 115)

The jury at this point is fully aware of the significance of the knife in evidence as merely exemplary of the generic class of weapon testimonially described

by the victim. Any similar knife whether obtained by a search or furnished from any kitchen would have had the same significance as far as jury consideration was concerned.

There is no reasonable possibility that the evidence complained of might have contributed to the conviction and error, if any, was harmless. Chapman v. California, 386 U.S. 18 (1967).

The two leading Federal cases on the issue of admissibility of evidence allegedly seized in violation of the exclusionary rules are United States v. Carmichael, 489 F.2d 983 (C.A. 7 1973) and United States v. Thomas, 489 F.2d 664 (C.A. 5 1973). The other Circuit Courts ruling on the subject have adopted one or the other or a combination of these cases: U.S. v. Belculfine, 508 F.2d 58 (74); U.S. v. Gonzalez, 488 F_2 833 (73); U.S. v. Vento, 533 F.2d 838 (76); U.S. v. Lee, 540 F_2 1205 (76); U.S. v. Thomas, 489 F_2 664; U.S. v. Luna, 525 F_2 4 (75); U.S. v. Carmichael, 489 F_2 983 (73); U.S. v. Marihart, 492 F_2 897 (74); U.S. v. Bolton, 458 F.2d 377 (72); and U.S. v. Harwood, 470 F.2d 322 (72). Carmichael, supra, holds evidence inadmissable if (1) There is a deliberate inclusion of a false statement or (2) a reckless inclusion of a false statement essential to the finding of probable cause. Thomas, supra, adds a further refinement of any unintentional false statement material to probable cause. The proffer or proof in the instant case is incapable of determination as to whether the misstatements thought to be present were intentional, reckless or negligent on the part of the affiants. One face is abundantly clear however. The attack centers on allegations non-essential to the establishment of probable cause.

The affidavit excised of the offensive paragraphs 15, 16, and 17 still contains factually (1) a rape occurred at a place a very short distance and within sight of where defendant lives (2) that 6 days previous to the rape he had sexually assaulted another female, Brenda Bradley, at his residence (3) that he knew of Cynthia Bailey (victim) and her sexual charge later on the same day it occurred (4) that the victim's description of the rape perpetrator matched the description of the defendant (5) that the defendant had a criminal record involving rape. (App. PPS. 7, 8)

A reading of the affidavit in the common sense manner dictated in United States v. Ventresca, 380 U.S. 102 (1965), leaves no doubt but that probable cause to issue the warrant amply survives the elimination of the questioned allegations. Without a specific initial showing of intentional misrepresentation (lack in this case) the alleged affidavit frailties become harmless error beyond a reasonable doubt. Chapman v. California, supra. Thus, the improvidence of granting this writ of certiorari is further demonstrated.

CONCLUSION

The exclusionary rule should not apply in this case and the judgment of the Supreme Court of Delaware should be affirmed.

Respectfully submitted,

HARRISON F. TURNER
Deputy Attorney General

RICHARD R. WIER, JR.
Attorney General

Attorneys for Respondent